



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dresser Industries, Inc.

File: B-228493

Date: February 17, 1988

DIGEST

Agency determination that specific model of scoop loader offered by bidder met the standard commercial product requirements in the invitation for bids was not unreasonable where the bidder certified in its bid the compliance of the loader with the specifications and the information available to the agency did not show that any needed modifications to the loader were so substantial that the product would no longer be a standard commercial product.

DECISION

Dresser Industries, Inc., protests the award of a contract to J.I. Case Company, under invitation for bids (IFB) No. DLA-700-87-B-4504, issued by the Defense Logistics Agency (DLA) for various quantities of scoop loaders for different military departments. Dresser alleges that the scoop loaders offered by Case fail to meet the commerciality requirements of the solicitation.

We deny the protest.

The solicitation called for the submission of bids for the supply of various-sized scoop loaders, built in accordance with Federal Specification No. KKK-L-1542C, as amended by the solicitation. The solicitation required bidders to identify the make or model of the offered scoop loader and to certify that it was the offeror's "standard commercial item which fully complies with the requirements of paragraph 3.3" of the Federal Specification, which required that the loader be "essentially the standard current product of the manufacturer, differing therefrom only in respects necessary to meet special requirements" in the specifications. The Federal Specification also required bidders to furnish proof that the offeror "is bidding on the latest current model loader, except as modified by this specification," although this information did not have to be submitted with the bids.

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The solicitation contained different commercial item clauses depending on the military department taking delivery. For those line items to be delivered to the Department of the Navy, the solicitation replaced Federal Specification paragraph 3.3 with the following provision:

"Standard Commercial Product: The item furnished shall, as a minimum, be in accordance with the requirements of this specification and shall be the manufacturer's standard commercial product. Additional or better features which are not specifically prohibited by this specification but which are a part of the manufacturer's standard commercial product, shall be included in the unit being furnished. A standard commercial product is a product which has been sold or is being currently offered for sale on the commercial market through advertisements or manufacturer's catalogs, or brochures, and represents the latest production model."

For those line items to be delivered to the Department of the Air Force, the solicitation added to Federal Specification paragraph 3.3 the following provision (in relevant part):

"Commerciality. The manufacturer shall be experienced in designing and building scoop loaders and shall have sold them to the general public at least one year prior to the opening date of the solicitation. Upon request of the contracting officer, offerors shall submit evidence of the commerciality of their machines in the form of catalogs, commercial brochures and data. Additionally, these bidders shall furnish names and addresses of nongovernment sources which were sold equipment at least one year prior to the opening date of the solicitation. . . ."

Seven bids from four offerors were received. DLA concluded that acceptance of Case's all-or-none bid covering all line items except one and the bid submitted by Deere & Company for the remaining item would result in the lowest overall cost.

Case certified in its bid that it was offering its model "W20" scoop loader in response to the line items for 2 1/2-cubic yard loaders. Shortly after bid opening, Dresser protested to the contracting officer that the net horsepower output of the current model W20 scoop loader did not comply with the Federal Specification requirement that the engine generate a minimum of 120 net flywheel horsepower. Dresser

submitted with its protest Case commercial literature describing the model W20C scoop loader and indicating that the engine in the "W20C Basic Tractor" generates 110 net horsepower. Dresser contended that any modification of the current commercial Case W20C loader to increase the horsepower would be inconsistent with the requirements of the solicitation's Standard Commercial Product clause (for the Navy loaders) and Commerciality clause (for the Air Force loaders).

In response to a post-bid opening inquiry from the contracting officer, Case verified by letter that it was offering its model W20C scoop loader, and that the commercial literature referenced by Dresser was current. Case added, however, that "the optional turbocharger referenced in the literature will be used." Based upon the certifications received from Case and a review of the commercial literature, the contracting officer denied Dresser's protest, concluding that Case's offered model, including optional equipment available to the general public and referenced in its literature, complied with the specifications. Upon learning of the ensuing award to Case, Dresser filed this protest with our Office.

Dresser acknowledges that increasing the net horsepower output of the engines used in scoop loaders is not difficult, and often can be accomplished simply by adjusting the fuel injection pump setting, or by adding a turbocharger. (This is confirmed by technical information Case provided to the agency after award, which indicates that the engine used in the W20C loader can be adjusted to generate in excess of 140 horsepower.) Dresser maintains, however, that increasing horsepower here by equipping the scoop loader engine with a turbocharger would violate the solicitation requirements for a standard commercial product since, Dresser contends, Case literature indicates that the turbocharger has only been offered commercially for the purpose of compensating for the loss of horsepower output caused by an increase in altitude, not for the purpose of increasing net horsepower output. Dresser maintains that using the turbocharger to increase horsepower is a significant difference in use that renders the scoop loader different from the standard commercial item because it will increase the stress on engine parts, resulting in a decrease in reliability if the parts are not designed to withstand the increased load.

Preliminarily, although Dresser refers in its protest to the Commerciality clause contained in this solicitation and reprinted above, we consider that clause to concern only the experience and capability of the manufacturer in producing the item rather than the performance history of the item

itself; as such, the clause concerns the offeror's responsibility--a matter within the agency's discretion--rather than the acceptability of the item as a commercial product. See Dresser Industries, Inc. B-228324, Dec. 29, 1987, 67 Comp. Gen. _____, 87-1 CPD ¶ 634.

We view Dresser's protest instead as questioning the commerciality of the scoop loader under the terms of the Standard Commercial Product clause, also reprinted above. As we have previously indicated, however, we will not disturb a contracting officer's discretionary decision concerning compliance with a commercial product requirement so long as there is evidence to support the determination. See generally Cheshire/Xerox, et al., B-226939, et al., Aug. 31, 1987, 87-2 CPD ¶ 208. We find the contracting officer's determination was so supported here.

Case offered in its bid to supply standard commercial products--model W20 scoop loaders--that met the specification requirements, and pre-existing Case commercial literature established that model W20C scoop loaders currently were being offered for sale on the commercial market with turbochargers as an available option. Turbocharged model W20C engines were perceived by the agency as capable of generating sufficient net horsepower to satisfy the specification requirements, and the record here does not establish otherwise. We are not persuaded that adding a turbocharger to the scoop loader engine strips the item of its overall standard commercial character merely because the turbocharger option commonly may be provided for other purposes; at least, we do not believe the agency was required to reach this conclusion. We consider it significant in this regard that, general assertions aside, Dresser has not cited any express limitation in Case's commercial literature providing for use of turbocharged loaders only at lower altitudes.

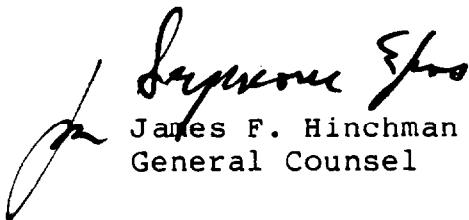
Moreover, while the solicitation generally sought standard items, it also contemplated modifications in the standard items normally furnished in response to the Federal Specification. The Federal Specification generally described the required scoop loaders as loaders "complete with all necessary operating accessories customarily furnished with power-shift loaders of this type. . . together with such modifications and optional attachments as may specified" (emphasis added) and the solicitation required various configurations of standard loaders and optional equipment. In fact, the solicitation specifically called for 125 horsepower (instead of the standard 120) for one scoop loader to be delivered to the Navy, and turbocharged engines for other scoop loaders. We therefore conclude that DLA reasonably determined that Case's bid

satisfied the solicitation requirement for a standard commercial item.

In its submission to our Office dated December 7, 1987, Dresser claims that information in the agency's report on the protest indicates that Case's model W20C loader does not comply with the performance requirements for all of the line items. It is unclear whether these alleged deficiencies were apparent at bid opening. In any case, since the deficiencies should have been apparent to Dresser upon its receipt of the report on November 17, these additional grounds for protest, not raised within 10 working days after Dresser should have been aware of them, are untimely and will not be considered. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1987).

Dresser also maintains that certain post-award statements by Case call into question whether Case intends to furnish the precise product it offered. As is well-established, however, whether Case will ultimately meet its commitment to fulfill the IFB's requirements is a matter of contract administration not for consideration by this Office. See Hicklin GM Power Co., B-222538, Aug. 5, 1986, 86-2 CPD ¶ 153.

The protest is denied.



James F. Hinchman
General Counsel